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United Nations Commission on International Trade Law

Forty-third session

Summary record of the 902nd meeting

Held at Headquarters, New York, on Monday, 21 June 2010, at 3 p.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

Contents

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

This record is subject to correction.

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

10-41484 (E)

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The meeting was called to order at 3.15 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Draft article 4. Response to the notice of arbitration (*continued*)

1. **Mr. Torterola** (Argentina) said that his delegation wished above all to avoid the risk that paragraph 2 (e) might be interpreted as in any way impeding a respondent's ability to make counterclaims or claims at a later stage, and was therefore proposing that that subparagraph begin with a phrase such as "As far as possible ...".

2. **The Chairperson** said that the components of the response to the notice of arbitration listed in paragraph 2 were in any event optional. The concerns of the representative of Argentina might be better met by making paragraph 1 (b) less prescriptive. That would have the merit of also addressing the concern, expressed at the 901st meeting, that the deadline of 30 days established in paragraph 1 might be too onerous for some parties and yet too lengthy for others. The wording proposed by the representative of Argentina matched that used in draft article 20, paragraph 4, which indicated that "The statement of claim should, as far as possible, be accompanied by all documents ...".

3. **Mr. Jacquet** (France) said that his delegation did not favour reflecting the wording of draft article 20 in draft article 4, paragraph 1 (b), because the two dealt with different situations and were not comparable. In the case of article 20, the situation was one of furnishing documentation, while in draft article 4, paragraph 1 (b), the situation involved a 30-day deadline for action. If the words "as far as possible" were applied to the deadline, it risked losing all significance.

4. **The Chairperson**, in connection with the requirements of paragraph 1 (b), said that the components of the response to the notice of arbitration fell into two distinct groups: those relating to the claims involved in the case, and those relating to the constitution of the arbitral tribunal. In practice, arbitral institutions tended to apply deadlines more strictly to some requirements associated with the response to a notice of arbitration than to others. He therefore wondered whether the representative of France wished strict deadlines to apply to responses to every component of the notice of arbitration described in draft article 3, paragraphs 3 (c) to (g).

5. **Mr. Jacquet** (France) said that, in his view, some discretion could be used in determining deadlines, depending on the nature of the information concerned.

6. **Mr. Chung** Chang-ho (Republic of Korea) said that he supported leaving the existing wording of paragraph 1 (b) unchanged. The purpose of the article as a whole was to clarify outstanding issues at an early stage in the arbitration process, so 30 days seemed to offer enough time to do so. Moreover, any respondent unable to respond to the notice of arbitration within those 30 days could indicate that fact in the statement of defence described in draft article 21.

7. **Mr. Moollan** (Mauritius), recalling the distinction between the compulsory and optional components of the notice of arbitration itself, covered in draft article 3, paragraphs 3 and 4, said that the very same distinction applied to draft article 4, paragraphs 1 and 2. As a result, making paragraph 1 (b) less prescriptive would have the effect of blurring that distinction. If he had understood it correctly, the concern of the Argentine delegation was that a respondent, in failing to provide the claimant with the information indicated in paragraph 2 (e) within the required 30 days, might lose any opportunity to do so at a later stage of the arbitration process. Perhaps that eventuality could be addressed by replacing "A response" in paragraph 1 (b) with "An indicative response".

8. **Mr. Ghikas** (Canada) said that the concerns of the representative of Argentina could probably be dispelled, as draft article 30, paragraph 1 (b), indicated that a failure by the respondent to communicate its response would not be treated by the arbitral tribunal as an admission by the respondent of the claimant's allegations.

9. **The Chairperson** said that, at the stage of the arbitral process to which draft article 4 applied, no arbitral tribunal would yet have been constituted. Moreover, the components of the response relating to the claims involved in the case were less urgently needed than those relating to the constitution of an

arbitral tribunal. A delay in supplying the latter would lead to a delay in starting the arbitral process.

10. **Mr. Castello** (United States of America) said that the representative of Argentina seemed to be focusing on the features of the draft revised UNCITRAL Arbitration Rules that were new relative to the 1976 Arbitration Rules, such as the requirement for a respondent to provide information relating to the merits of the case. He understood that the deadline for receipt of such information might be a problem, for example in the case of a State that was obliged to seek outside counsel via a time-consuming procurement procedure. By contrast, the requirement for a respondent to provide information on the constitution of the arbitral tribunal was not new, and was in fact subject to a more generous deadline than before: 30 days rather than the 15 days stipulated in article 5 of the 1976 version of the Rules.

11. **The Chairperson** said that he inferred from the current discussion that a respondent's failure to provide a response to the notice of arbitration in connection with the claims involved in the case was not considered as serious as appeared at first sight from reading draft article 4, paragraph 1 (b), alone, as that provision should be read in conjunction with draft article 30, paragraph 1 (b), which suggested that some considerable time was available to the respondent.

12. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, in the context of international arbitration rules as a whole, notices of arbitration and the responses thereto were customarily very brief, in contrast to statements of claim and statements of defence, which were more complete. Accordingly, the 30-day deadline seemed appropriate. It was, furthermore, in line with usual international arbitration practice. It should be remembered that the deadline applied in the current case to the information listed in draft article 3, paragraphs 3 (c) to (g), which did not need to be detailed. That seemed to be confirmed by draft article 3, paragraph 3 (e), which referred to "a brief description of the claim".

13. **The Chairperson** said that, if the solution proposed by the representative of Mauritius was adopted, it could apply only to some of the components of the response listed in paragraph 1 (b), namely those relating to the components of the notice in draft article 3, paragraphs 3 (e) and (f). In view of the discussions that had just taken place, the first option was to leave draft article 4, paragraph 1 (b), unchanged, and the second option was to replace "A response" at the beginning of that subparagraph with "An indicative response", specifying also that that applied only to article 3, paragraphs 3 (e) and (f).

14. **Ms. Smyth** (Australia), supported by **Mr. Möller** (Observer for Finland), said that it was preferable for draft article 4, paragraph 1 (b), to be left unchanged.

15. **Mr. Boulet** (Observer for Belgium) said that adding the word "indicative" risked creating confusion as to what information was admissible and the degree to which it was binding. Moreover, draft article 4 already made a useful distinction between compulsory and optional information and should not have added to it a further category of information termed "indicative". He therefore also favoured leaving draft article 4, paragraph 1 (b), unchanged.

16. **Mr. Castello** (United States of America) said that his delegation also preferred draft article 4, paragraph 1 (b), to be left unchanged. However, if the Working Group and the Committee felt it necessary to communicate the non-binding nature of some of the information required of the respondent, he did not favour adding the word "indicative", which risked being misinterpreted. Perhaps a reference could be made to draft article 30 (1) (b) instead.

17. **Mr. Lebedev** (Russian Federation) said that he favoured leaving draft article 4, paragraph 1 (b), unchanged, as the concern raised by the representative of Argentina presented itself in only a few cases, and those cases could be resolved by a number of means.

18. **The Chairperson** said that the Committee seemed to agree that information provided by the respondents on claims involved in the case should not be considered binding at that stage of the arbitration process. He took it that the Committee wished to adopt draft article 4 unchanged and to reflect its discussions on the matter in the draft report of the Commission.

19. *Draft article 4 was adopted.*

Draft article 9

20. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) pointed out that the text of paragraph 1 did not provide for the two arbitrators appointed by the parties to consult with the parties prior to choosing the president of the arbitral tribunal. Since it was the usual practice for the arbitrators to do so, it would be

preferable to specify that the choice should be made after consultation with the parties should the arbitrators so decide.

21. **Mr. Petrochilos** (Greece) said that he supported the amendment because it made it clear that consultation was not precluded and that both arbitrators could consult.

22. **Mr. Möller** (Observer for Finland) said that he preferred leaving the text as it stood because it already allowed for such consultation.

23. **Mr. Castello** (United States of America) said that the proposed amendment would have to make it clear whether both arbitrators could consult with both appointing parties or simply each arbitrator with the corresponding party, which was the usual practice. Since most other rules were unspecific on the matter, he himself doubted that the amendment was needed.

24. **Mr. Chung** Chang-ho (Republic of Korea) said that the established practice of consultation by the arbitrators with the parties might conceivably be seen to conflict with the need for their impartiality and independence under other provisions of the Rules. Perhaps that issue should be clarified by making an addition to draft article 11 confirming the acceptability of that practice.

25. **Mr. Castello** (United States of America) observed that, in many ethics guidelines, consultation with the party regarding the choice of a possible arbitrator was not considered problematic.

26. **Mr. Schöll** (Observer for Switzerland) pointed out that the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, in Canon III.B.2, made it clear that, as the United States had suggested, each arbitrator could consult with his or her appointing party. He supported retaining article 9, paragraph 1, as drafted.

27. **Mr. Torterola** (Argentina) said that it was not necessary to legislate about exceptions to the rule. He believed the text as it stood left enough latitude for what was the accepted practice.

28. **The Chairperson** said that the consensus seemed to be to retain draft article 9, paragraph 1, as drafted, with the understanding that the report would indicate that the standard practice was uncontested and thus the Commission saw no need to make express provision for it. He drew attention to the comment by Slovenia (in document A/CN.9/704, p. 5) that both paragraphs of draft article 8 were relevant to draft article 9, paragraph 3, and not merely the second paragraph, as indicated in the current text. He therefore took it that the Committee wished to delete the words ", paragraph 2" at the end of article 9, paragraph 3, and thus refer to draft article 8 in its entirety.

29. *It was so decided.*

30. *Draft article 9, as amended, was adopted.*

Draft article 10

31. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that the aim of paragraph 3 of article 10 was to safeguard the equality of the parties as to the appointment of arbitrators — in line with the 1992 judgement of the French Court of Cassation in the *Dutco v. BKMI and Siemens* case — by allowing the appointing authority, when constituting the arbitral tribunal, to revoke any appointment already made so as to appoint the entire tribunal. He suggested adding the clause ", while respecting the equality of the parties" at the end of paragraph 3, in order to emphasize the principle.

32. **The Chairperson** said that perhaps the requirement to respect the equality of the parties was self-evident.

33. **Mr. Petrochilos** (Greece), recalling the legislative history of paragraph 3, said that it had been intended to accommodate all legal systems in resolving situations such as the one that had given rise to the *Dutco* case. If the proposed wording was added, the provision might diverge from the International Chamber of Commerce (ICC) International Court of Arbitration Rules and the London Court of International Arbitration (LCIA) Rules, and create more problems than it solved.

34. **Mr. Montecino Giralt** (El Salvador) said that he supported the amendment proposed by the Comité Français because the text as it stood might make the parties unequal.

35. **Mr. Jacquet** (France) said that while it might seem tautological to refer explicitly to equality of the parties in a rule aimed at that principle, the proposed amendment would have the advantage of instructing the appointing authority to bear that principle in mind at all times.

36. **The Chairperson** suggested that it might be better to introduce such a reference to equality of the parties in draft article 6 in general terms rather than in draft article 10 in connection with one specific intervention by the appointing authority.

37. **Mr. Jacquet** (France) said he considered that an ingenious solution.

38. **Mr. Castello** (United States of America) said he agreed with Greece that the proposed additional wording would create more difficulties than it solved. It would be best to state in the report that the purpose of the provision was to achieve equality of the parties, and leave it at that.

39. **Mr. Boulet** (Observer for Belgium) said that he believed the text should be made more specific, perhaps simply by stating that the appointing authority might "if need be" revoke any appointment already made.

40. **Mr. Moollan** (Mauritius) said that he agreed with the United States that it would open a Pandora's box to refer to equality, either in draft article 10 or draft article 6. Article 10, paragraph 3, alleviated the *Dutco* problem by shifting the power of appointment from the parties to an institution, and the text should not in any way tie the hands of the appointing authority. In effect, the problem of the equality of the parties was resolved by removing the power of appointment from the parties.

41. **Mr. Ghikas** (Canada) concurred.

42. **The Chairperson** said that there seemed to be consensus that the appointing authority should be allowed to exercise discretion as to whether or not to revoke an appointment already made and should be given the same freedom that the parties had. The equality of the parties was of course the basic principle for the appointing authority, but it should not be specifically prescribed. The substance of the discussion on paragraph 3 could simply be set out in the report.

43. *Draft article 10 was adopted.*

Draft article 11. Disclosures by and challenge of arbitrators

44. **Mr. Abascal Zamora** (Mexico) said that any circumstances that might give rise to justifiable doubts as to the impartiality or independence of an arbitrator might be known by means other than notification by the arbitrator. His delegation therefore proposed that, in the final part of the draft article, the words "unless they have already been informed by him or her of these circumstances" should be replaced by "unless they have already been informed of these circumstances".

45. **Mr. Moollan** (Mauritius) wondered whether the point just made was not covered by draft article 12, paragraph 2.

46. **The Chairperson** said that Mexico's proposal went further in that it would allow an arbitrator to claim that the parties already had knowledge of the circumstances in question.

47. **Mr. Abascal Zamora** (Mexico) said that draft article 11 set an obligation of disclosure, whereas draft article 12 regulated challenges made to an arbitrator by a party.

48. **The Chairperson** wished to know whether the present wording of draft article 11, which was the same as that of article 9 of the 1976 version of the Rules, had given rise to any problems in practice.

49. **Mr. Moollan** (Mauritius) said that, as an arbitrator could not be expected to know what was known by the parties, that could not qualify his or her obligation of disclosure. As for challenges to an arbitrator, the stipulation in draft article 13, paragraph 1, that such challenges must be notified within 15 days would debar such challenges in the hypothesis of the circumstances being already known to the parties.

50. **The Chairperson** said that the restrictive nature of the present wording of draft article 11 did not appear to have any real consequences, since a party could not rely on what had been known all along in order to make a challenge.

51. **Mr. Torterola** (Argentina) agreed with the delegation of Mauritius that the obligation of disclosure should not be affected by what might already be known to the parties. Turning to the question of justifiable doubts, he said that the present wording was not clear as to whom such doubts might be considered justifiable. His delegation proposed that it should be specified that the doubts must be justifiable in the view of an impartial third party.

52. **The Chairperson** said that there appeared to be a consensus in favour of retaining the present wording.

53. *Draft article 11 was adopted.*

The meeting was suspended at 4.55 p.m. and resumed at 5.15 p.m.

Draft article 12

54. *Draft article 12 was adopted.*

Draft article 13

55. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that the present wording of the draft article did not require reasons to be given for the decision taken by the appointing authority on a challenge to an arbitrator. Although some institutions, like the International Chamber of Commerce, did not give reasons for their decisions on such requests, in a context where the parties had not necessarily designated the appointing authority in advance, those parties might not wish to leave such decisions to the complete discretion of that authority. The Comité Français de l'Arbitrage therefore proposed that the wording of the final sentence of draft article 13, paragraph 4, should be changed accordingly, with, in addition, the introduction of a reasonable time limit, so that it would read: "In that case, within 30 days from the date of the notice of the challenge, it shall seek a reasoned decision on the challenge by the appointing authority within a reasonable time".

56. **Mr. Moollan** (Mauritius) said that there had been much debate on the desirability of reasons being given for such decisions by the appointing authority. The present forum was not the most appropriate place to decide the matter. The International Chamber of Commerce had chosen not to give the reasons for its decisions on such requests; some years previously, the London Court of International Arbitration had decided to do so, but in fact it still did not publish such reasons because of the problems that might ensue.

57. **Mr. Seweha** (Egypt) said that doubts as to the impartiality of an arbitrator should not be based on hearsay. It would not be sufficient to be given reasons for a challenge; supporting evidence should also be required, as in draft article 20, paragraph 4. His delegation therefore proposed the addition at the end of the second sentence of paragraph 2 of words to the following effect: "[... reasons for the challenge], and, as far as possible, provide the documents and other evidence relied upon by the challenger."

58. **Mr. Montecino Giralt** (El Salvador) suggested that, for the sake of clarity, it would be useful to include an obligation to give reasons for a challenge in paragraph 1 and not paragraph 2 of the draft article. That would solve the problem of whether the period of time should be calculated from the time of receipt of the notice of the challenge or of the making of the challenge.

59. **The Chairperson** recalled that Slovenia had pointed to the inconsistency between the method of calculating a period of time prescribed in draft article 2, paragraph 5, where the starting date was the date of receipt of a notice, and the 15-day rule set out in draft article 13, paragraph 4, where the starting date was the date of the notice. Since that difference did not appear to create a problem that needed to be resolved in draft article 13 and as, moreover, there was no support for any of the proposed amendments, he took it that the present wording of that draft article should stand.

60. *Draft article 13 was adopted.*

Draft article 14. Replacement of an arbitrator

61. *Draft article 14 was adopted.*

Draft article 15. Repetition of hearings in the event of the replacement of an arbitrator

62. *Draft article 15 was adopted.*

Draft article 16. Exclusion of liability

63. **The Chairperson** recalled that, in its comments regarding draft article 16 (A/CN.9/704), the Permanent Court of Arbitration (PCA) had indicated that it enjoyed legal immunity under various international instruments. It had further indicated that such immunity provided sufficient protection against liability, and that a specific waiver under the revised Arbitration Rules was therefore unnecessary in respect of the Court. He took it that, unless there were objections, the Committee wished to comply with the Court's request and remove the phrase "the Secretary-General of the PCA" from the draft article.

64. **Ms. Cordero Moss** (Norway) said that the proviso "save for intentional wrongdoing" might create the impression that the Arbitration Rules created a liability for intentional wrongdoing, even if there was no such liability under the applicable law. Since the existence of liability was regulated by the applicable law, the Rules could not regulate the existence of

liability; they could only allocate its financial consequences between the parties.

65. To avoid creating such an impression, her delegation proposed that the beginning of draft article 16 should be amended to read: "The parties waive, to the extent permitted under the applicable law, any claim that they may have under that law against the arbitrators ...".

66. **The Chairperson** observed that the language proposed by the representative of Norway would eliminate the words "intentional wrongdoing", thereby addressing the concerns raised in the comments that had been submitted by El Salvador (A/CN.9/704/Add.1) concerning the connotation of those words.

67. **Mr. Abascal Zamora** (Mexico), recalling that the concept of intentional wrongdoing was difficult to define in civil law systems, said his delegation shared the concerns that had been raised by El Salvador and supported the amendment proposed by the representative of Norway.

68. **Mr. Petrochilos** (Greece) said that he supported the proposed amendment. Recalling that arbitral decisions could not be appealed against on grounds of merit, he said that the Working Group had endeavoured to exclude liability to the extent possible in order to avoid the possibility of collateral challenges and attacks against arbitrators.

69. **Mr. Seweha** (Egypt) said that his delegation did not understand the reasoning behind the proposed amendment. He wondered why arbitrators should be granted rights not enjoyed by other professions. For example, judges were not exempt from liability and could be prosecuted for committing errors and forced to pay compensation. Arbitrators did not require such absolute protection, which could be abused. Questions of liability were best addressed under the relevant laws of each country. In fact, the laws of some countries, such as Egypt, did not provide for advance exemption from liability and considered such arrangements to be contrary to public order.

70. **Mr. Boulet** (Observer for Belgium) said that he supported the position of the representative of Egypt in connection with Norway's proposal. However, if the intention of that proposal was simply to emphasize that the Arbitration Rules may not regulate the existence of liability, then it would be preferable to delete the entire article. The key question was whether the Rules should in any way allow parties to waive claims against the arbitrators, even in cases of intentional wrongdoing, if the applicable law provided for such a waiver. The Working Group had decided that there must be a minimum ethical standard and parties should therefore not be allowed to make such waivers.

71. **Mr. Jacquet** (France) said that the draft article did not contain sufficient qualifications in respect of the waiving of claims against arbitrators: it was too indiscriminate. Under the present wording, the waiver targeted any and all action taken by the arbitrators, as well as individuals other than arbitrators, and yet simultaneously curtailed considerably the opportunity for a waiver by referring to applicable law. It would be preferable to use clearer and more categorical language, such as "no legal claim may be pursued against arbitrators on the basis of any aspect of an arbitral decision".

72. **Mr. Castello** (United States of America) said that the language of the article should focus on the question of the waiver. It was his understanding that the proposal of the representative of Norway was aimed at dispelling any implication that the article was creating liability. He wondered, however, whether it was desirable to remove the phrase "save for intentional wrongdoing", which the Working Group had arrived at after much debate. The point on which he sought clarification was whether, in those countries in which arbitrators could be held accountable for intentional wrongdoing, parties would be waiving their right to hold arbitrators accountable for intentional wrongdoing simply by adopting the Arbitration Rules. The wording proposed by the representative of Norway did not address that situation.

73. **Ms. Cordero Moss** (Norway) said that, unfortunately, there was no simple answer to the question raised by the representative of the United States of America because the draft article was not clear as to what constituted intentional wrongdoing. Therefore, in certain jurisdictions, there could be circumstances under which liability would somehow overlap with certain aspects of intentional wrongdoing. The Arbitration Rules would be establishing liability for certain acts, such as intentional wrongdoing, on the assumption that there was a universal understanding of what constituted intentional wrongdoing. However, legal systems had divergent positions as to which forms of liability were mandatory and which forms could be waived, the extent to which they could be

waived and in which circumstances. The laws of each State would therefore dictate whether liability could be waived.

74. **Mr. Castello** (United States of America) said that, based on the representative of Norway's reply, it seemed that the parties could, in certain circumstances, waive the right to make a claim on the basis of intentional wrongdoing. While it was true that the extent to which parties could waive liability varied from one jurisdiction to another, it was his understanding that the representative of Norway was implying that, because intentionality was viewed differently in various jurisdictions, it would make the scope of any waiver uncertain. However, after a long discussion, the Working Group had concluded that intentionality was a legal concept that was recognized under most legal systems. His delegation was therefore reluctant to delete the reference to intentional wrongdoing simply because no better solution was available.

The meeting rose at 6 p.m.

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United Nations Commission on International Trade Law

Forty-third session

Summary record of the 903rd meeting

Held at Headquarters, New York, on 22 June 2010, at 10 a.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

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10-41657 (E)

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The meeting was called to order at 10.20 a.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add. 1-10)

Draft revised UNCITRAL Arbitration Rules

Section II. Composition of the arbitral tribunal (*continued*)

Draft article 16. Exclusion of liability (*continued*)

1. **The Chairperson**, recalling the observations made following informal discussions, said that some delegates had noted that the term "intentional wrongdoing" was used in some national laws but not in others, and that it was expressed in different forms in different legal orders. Others, however, had felt that intentional wrongdoing was at the core of all liability claims for wrongful acts and that judges everywhere would understand the concept, regardless of the term used to capture it in their national laws. In response to the view that the draft article could create a liability claim where none existed, some delegates had pointed out that, by saying that "the parties waive ... any claim against the arbitrators", the draft article was, in fact, saying that there was a claim that could be waived.

2. Lastly, some delegates had noted that, in some legal systems, there were situations where the applicable law went further than "intentional wrongdoing" and where liability could not be waived. Others had said that those situations were covered by the expression "to the fullest extent permitted under the applicable law".

3. **Mr. Snijders** (Observer for the Netherlands) said that there were only slight differences in the terminology used to express the idea of intentional wrongdoing around the world and that those differences had no impact on the application of the concept. His delegation therefore supported the draft article as presented.

4. **Ms. Aguirre** (Argentina), speaking in support of the draft article, said that it had been discussed at length in the Working Group and that the text submitted was the result of a consensus reached among the members.

5. **The Chairperson** said that even if the Working Group had reached a consensus, the Committee of the Whole should not be limited in its examination of the draft articles, especially if it felt that something deserved to be reconsidered.

6. **Ms. Matias** (Israel) said that she supported the text as presented, subject to the general agreement that the reference to the Secretary-General of the PCA would be deleted.

7. **Mr. Bellenger** (France) said that the report should show that some delegations, including his own, were somewhat uneasy with the draft article, not only because of its substance, but also because it was not in line with practice. In addition, it was an illusion to think that national judges would be bound by that provision on the settlement of arbitral disputes. The draft article would create a situation where people thought they were protected by the Rules of Arbitration when in fact they were not.

8. **The Chairperson** said that all delegates were aware that protection was not absolute, which was why the text set out the condition of "intentional wrongdoing".

9. *Draft article 16, as amended, was adopted.*

Draft article 2. Notice and calculation of periods of time (*continued*)

10. **The Chairperson** drew attention to document A/CN.9/704/Add.8, which contained a revised version of draft article 2.

11. **Ms. Matias** (Israel) said that her delegation supported the proposal made by the delegation of the United States of America in document A/CN.9/704/Add.1 to retain the version of draft article 2 found in A/CN.9/WG.II/WP.157.

12. **The Chairperson** recalled that one of the points which had been raised about the draft article was the requirement, upon the delivery of a communication, of a record of the "information contained therein", as stated in paragraph 3. It had been argued that, in many forms of transmission of communications, there was no record of the information contained therein. With courier services, for example, a signature of the addressee confirming that a package had been delivered was sufficient. As the expression "information contained therein" had been introduced only in the context of electronic communication, a proposal had been made to delete those words, in order to have a rule that applied to all forms of transmission.

13. **Ms. Cordero Moss** (Norway) and **Ms. Matias** (Israel) supported the proposal.

14. **Mr. Chung** Chang-ho (Republic of Korea), while expressing support for the proposal, said that he would prefer to revert to the language of paragraph 1 of working paper A/CN.9/WG.II/WP.157, which read as follows: "Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provides a record of its transmission". That paragraph had been chosen originally because it covered every possible means of transmission.

15. **The Chairperson** said that that paragraph had been recast in draft article 2, paragraph 3, but he took it that the Committee had agreed to delete the words "the information contained therein".

16. *It was so decided.*

17. **The Chairperson**, turning to the rest of the paragraph and the record of "sending and receipt", wondered whether the concerns raised earlier could be resolved by replacing that expression with "the record of transmission".

18. **Mr. Chung** Chang-ho (Republic of Korea) said that he agreed with the suggestion, but that the text of paragraph 1 proposed in working paper A/CN.9/WG.II/WP.157 (para. 8) should become the first paragraph of draft article 2 because, unlike paragraph 3, which referred only to notices under paragraphs 1 (b) and 2, that text would set out the general principle of methods of communication.

19. **The Chairperson** wondered whether, in paragraph 3, changing the wording from "sending and receipt" to "transmission" would cover receipt of a notice or not.

20. **Mr. Chung** Chang-ho (Republic of Korea) said that transmission covered only sending, because receipt must be proven by the receiving party. However, evidence of receipt was not necessary. The only reference should be to methods of transmission, including electronic transmission.

21. **Ms. Matias** (Israel) said that she fully supported the proposal to include a reference to means of communication in paragraph 1.

22. **The Chairperson** said that apart from the specific reference in paragraph 3 to paragraphs 1 (b) and 2 and "information continued therein", the only difference between the present paragraph 3 and the previous paragraph 1 was the use, in the latter, of the word "transmission" instead of "sending and receipt". Delegations should therefore decide whether to use the expression "record of sending and receipt", or "record of sending" only, or "record of transmission". They should also decide whether the chosen expression should be included in a new paragraph 1 or retained in paragraph 3.

23. **Mr. Castello** (United States of America) said that paragraph 3 should be deleted altogether and replaced with paragraph 1 from the working paper (A/CN.9/WG.II/WP.157). If the Rules required a record of receipt as proposed in draft article 3, they would become more complicated, because there were circumstances where it would be impossible to obtain a record of receipt. The only change his delegation might suggest to the proposed paragraph 1 would be to replace the word "delivered" with "sent", because that paragraph referred to permissible modes of transmitting documents to the other parties or to the tribunal.

24. **The Chairperson** said that he did not see how replacing the present paragraph 3 with the proposed paragraph 1 would change anything, because what was required was not a record of receipt, but simply a record of sending. If "delivered" were replaced by "sent", the problem of physical delivery would not be resolved, because there was no need for a record of sending when something was delivered in person.

25. **Mr. Castello** (United States of America) said that the proposed paragraph 1 should be placed at the top of draft article 2 because it referred generally to all means of communication. With regard to physical delivery, the sending party would usually want to have a record of compliance with the required mode of delivery, whether it was by way of a form or by any other means which would qualify as a record of transmission.

26. **The Chairperson** said that he had thought that if something was delivered physically then it could not be considered to have been sent.

27. **Mr. Ghikas** (Canada) said that "deemed receipt" was contemplated in certain circumstances and that mere sending in those circumstances would constitute evidence of receipt.

28. **Mr. Seweha** (Egypt) said that draft article 2 should be comprehensive and inclusive of all practical

cases. It was his understanding that paragraph 1 (a) referred to situations where the addressee was present at the designated place of delivery and received the notification. Paragraph 1 (b), on the other hand, referred to situations where the addressee was not present at the address, such that the communication was delivered at the habitual residence or place of business, or was sent to the last-known address.

29. The stipulation in paragraph 1 (b) that the notice would be deemed to have been received if it was delivered at the habitual address was difficult to understand. It was unclear whether if someone living with the addressee received the notice or if the notice was left at the door, it would be deemed to have been delivered. Consequently, his delegation proposed that a new paragraph should be added to cover cases where the addressee was present and refused to take delivery of the notice.

30. **The Chairperson** said that refusal to take delivery was covered by paragraph 2, which said that if delivery failed, the notice was deemed to have been received if it was sent to the addressee's last-known place of business or address.

31. **Mr. Seweha** (Egypt) said that as deemed receipt would apply only if the notice was sent to the addressee's last-known address or place of business, it meant that delivery failed because the addressee's current address was unknown. If the paragraph had intended to convey refusal of receipt, then there would have been no need to refer to the last-known place of business or address. Therefore, neither paragraph 1 (a) nor paragraph 2 covered the situation where a person or his or her representative was present but refused to take delivery of the notice.

32. **The Chairperson** suggested that if the word "receipt" was replaced by "sent", then that problem might not arise, and if receipt was no longer required, then the issue of deciding who should take delivery of a notice would be moot.

33. **Mr. Chung** Chang-ho (Republic of Korea) said that the word "delivered" in the previous paragraph 1 should be retained instead of "sent", because delivery was the principal method of communication, while sending was a concept of communication which applied only when the addressee could not be found.

34. **The Chairperson** said he took it that the proposal was that the word "sending" could be used in the current paragraph 2 when the only option was to send the notice to the last-known address. He wished to know what would happen under the current Rules if the word "delivered" was retained and the addressee refused to take delivery of the notice.

35. **Mr. Chung** Chang-ho (Republic of Korea) said that if the addressee refused to take delivery, the person delivering the notice would leave it at the house and make a record that the notice had been delivered to the address.

36. **The Chairperson** suggested that, for the sake of clarity, draft article 2 might have to be revisited at a later stage.

37. **Mr. Petrochilos** (Greece), speaking on behalf of his own delegation and the Chairperson, introduced a new proposal for a revised version of draft article 2, which read as follows:

> "1. For the purposes of these Rules, any notice, including a notification, communication or proposal, may be delivered:
>
> (a) physically to the addressee; or
>
> (b) at the habitual residence or place of business of the addressee, or at any other address previously designated by the addressee for this purpose; or
>
> (c) at the addressee's last-known place of business or address, if after reasonable efforts delivery cannot be effected in accordance with paragraph (a) or (b).
>
> 2. Delivery shall be effected by any means of communication that provides a record of sending and receipt.
>
> 3. Notice shall be deemed to have been received on the day it is delivered under paragraph 1.
>
> 4. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business

days occurring during the running of the period of time are included in calculating the period."

38. **Mr. Jacquet** (France), welcoming the proposal introduced by the representative of Greece, said that delivery and receipt were not as important as they appeared. The rules on notifications indicated by what means a communication could validly be made by one party to another, and their purpose was to avoid the need for comprehensive proof of delivery of the notification to the other party and proof of that party's knowledge of the notification. He proposed that the word "delivery" in paragraph 1 (c) of the text proposed by the Greek delegation should be replaced with the word "notification" because the subparagraph in question referred to circumstances in which it had not been possible to effect notification under subparagraphs (a) and (b). It was not logical to introduce a requirement of delivery in subparagraph (c) when no such requirement was mentioned in subparagraphs (a) and (b).

39. With regard to the comments made by the representative of Egypt, there was no need to provide for the possibility of a party's refusal to receive notification. Once a notification had been sent under paragraph 1, refusal of receipt was irrelevant, and providing for such refusal would negate the impact of the modes of notification set out in paragraph 1.

40. **The Chairperson** said that there seemed to be general agreement that the words "transmission" or "sending" should be used instead of "receipt". He asked whether the term "transmission" was preferred to the word "sending".

41. **Ms. Matias** (Israel) said that her delegation had favoured the concept of a record of receipt, but, in view of the concerns raised by other delegations, would not insist on it. Her delegation preferred the word "transmission" to the word "sending". She agreed with the representative of the Republic of Korea that the word "delivered" should not be replaced with the word "sent" in the version of draft article 2, paragraph 1 (b), contained in document A/CN.9/703, since the provision in general dealt with time frames based on the date of delivery.

42. **Mr. Boulet** (Observer for Belgium) said he agreed that the concept of sending should be regarded as an exception; the general principle behind the draft article was that of delivery. It would be preferable to refer to a record either of sending or of delivery; the use of the word "transmission" would create unnecessary ambiguity.

43. At the same time, his delegation would prefer to retain the reference to a means of communication that provided a record of receipt, since the sender had the burden of proof in the event of a dispute as to whether or not the notice had been received. However, if there was a consensus in favour of referring only to a record of sending, his delegation would go along with it, particularly since, if a dispute arose, draft article 27 in any case provided that each party had the burden of proving the facts relied on to support its claim or defence. Therefore, if the sender wanted to guard against the possibility of a dispute, it could choose a means of communication that provided a record of receipt. Moreover, in most cases no dispute would arise anyway.

44. **Ms. Peer** (Austria) said that, while her delegation understood the concerns that had been raised about requiring a record of receipt, it would prefer not to remove the requirement completely. Records of receipt were particularly important with regard to notices of arbitration, since only such a record would provide certainty that a party had knowledge of the arbitration proceedings. However, her delegation could accept a text that referred only to a record of transmission.

45. **Mr. Petrochilos** (Greece) said that the 1976 Arbitration Rules treated delivery and receipt as two sides of the same coin; if physical delivery was effected, then the notice was deemed to have been received. Like most laws on the subject, the Rules approached the question of delivery from the perspective of the sender and placed a burden on the sender to effect delivery.

46. The Rules did not deal with situations in which the address was not the correct address or in which a given representative of the recipient was not a proper representative; nor did they need to deal with such situations because, if a party claimed not to have received proper notice of arbitration proceedings, the matter could be resolved by the arbitral tribunal or the courts. Similarly, the matter of refusal by a party to take delivery of a notice was not explicitly addressed in the Rules; however, if the sender, through an intermediary, effected delivery and the person physically making the delivery recorded that it was refused, the delivery was nonetheless considered effected. Disputes as to whether or not proper notice

had been received in such circumstances were again a matter for the tribunal or the courts. The scope of the Rules was therefore limited in those respects; they focused on the practical concepts of delivery and transmission by proper means to the right addressee at the right address, which led to a presumption of receipt and of the time of that receipt. The revised version of draft article 2 proposed by his delegation and the Chairperson aimed to reflect those concepts.

47. **Mr. Chan** (Singapore) said that one of the purposes of revising the Arbitration Rules was to bring them into line with the Commission's work in other areas, in particular the area of electronic communications. He therefore proposed that the word "delivery" should be replaced by the word "dispatch", in line with the United Nations Convention on the Use of Electronic Communications in International Contracts.

48. **Mr. Seweha** (Egypt) said he agreed with the representative of Belgium that the sender, as the initiator of delivery, should bear the burden of proof of receipt. Since the Arbitration Rules did not place such a burden on the sender, they should make it clear that, if the sender did not obtain proof of receipt, it incurred the risk of the addressee's denying receipt. The Egyptian courts had operated in line with the approach set out in the 1976 Rules until 2005, when they had introduced a requirement for senders to obtain proof of receipt. That might lead to difficulties in the enforcement of decisions of arbitral tribunals in Egypt.

49. **Mr. Ghikas** (Canada) noted that draft article 3 stated that the parties must "give" notice of arbitration, whereas draft article 4 contained the word "communicate". That terminology should be reviewed in the light of the eventual decision on the wording of draft article 2.

50. **The Chairperson** noted that, in addition, draft article 3, paragraph 2, contained the word "received", which might need to be reviewed, once draft article 2 had been finalized, for cases where no physical delivery was effected.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

51. **The Chairperson** said that the consideration of draft article 2 would be resumed at a later stage pending further consultations.

Section IV. The award

Draft article 34. Form and effect of the award

52. **Mr. Castello** (United States of America) said that, bearing in mind the extended debate that had taken place in the Working Group and the Group's difficulties in reaching agreement on an exception to the waiver provided for in draft article 34, paragraph 2, the easiest solution was not to try to craft such an exception but rather to rely on the understanding reflected in many other rules that the waiver referred only to the right under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to resist enforcement or to apply for the setting aside of an award. His delegation therefore favoured deleting all the words contained in square brackets in the current text, except for the word "or" that appeared before the word "review". The word "against" should also be changed to "of".

53. **Mr. Moollan** (Mauritius) expressed agreement with the United States proposal. The rule would then be consistent with many other institutional rules and would also deal with a number of issues that had arisen under the 1976 Arbitration Rules.

54. **Mr. Ghikas** (Canada) said that his delegation favoured retaining only the first two sentences of the paragraph and deleting the remainder, so that the rule would remain almost identical to the 1976 version. Arbitral awards should be final, and possibilities for "second-guessing" them should be limited, as under the UNCITRAL Model Law on International Commercial Arbitration. The waiving of rights at law that would otherwise exist at the seat of arbitration should be done in a considered way and should not become a matter of course under the Rules. When drafting arbitration agreements, commercial parties usually gave considerable thought to the question of where the arbitration was to be seated, and one factor in their decision was the rights of appeal or review in the jurisdictions in question. The provision as currently drafted might not be interpreted in the same way in different jurisdictions. Moreover, as illustrated by two court decisions in Canada, it could not be assumed that such rights as the right to set aside an arbitration award under the Model Law would be preserved. However, if there was a consensus in favour of retaining the third sentence of the paragraph, then the second half of the

sentence, from the word "except" onwards, should be retained in some form.

55. **Ms. Hu** Shengtao (China), expressing support for the comments made by the representative of Canada, said that, whether or not the phrase in the last set of square brackets was kept, wording along the lines of "unless the laws of the country where the arbitration takes place stipulate otherwise" should be added at the beginning of the last sentence of the paragraph.

56. **Mr. Möller** (Observer for Finland) said that he supported the proposal made by the United States representative for the reasons set out by him. The 1976 version of the rule had not caused any difficulties to date. There was no need to add language along the lines of "insofar as such waiver can validly be made", because if the applicable law did not allow for a waiver, then the rule itself would not apply anyway.

57. **Mr. Torterola** (Argentina) said that, as pointed out by the representative of Canada, arbitral awards were final and binding on the parties. The rights set out in the New York Convention should not be undermined. The paragraph as currently drafted would be acceptable only if all the text in square brackets was retained. Otherwise the third sentence should be deleted entirely, as proposed by the representative of Canada.

58. **Ms. Smyth** (Australia), expressing support for the United States proposal, said that the concerns raised by the delegation of Canada and others were dealt with to some extent by the words "insofar as they may validly do so by adopting these Rules", which preserved the fundamental rights of recourse under the New York Convention. The third sentence of the paragraph was a useful addition because it minimized the possibility of other types of challenges to the merits of the award, which was consistent with the fundamental principle that awards were final and binding and should be carried out without delay. However, the text in square brackets in the second half of the sentence, in distinguishing between applications requesting the setting aside of an award and proceedings regarding execution and enforcement, highlighted the difficulties that had been faced in crafting an appropriate wording. For that reason, her delegation supported the United States proposal that the bracketed text should be deleted; however, if it was retained, it should be kept in its entirety. Her delegation saw no contradiction between allowing parties to challenge execution and enforcement and the fundamental principle that awards should be carried out without delay.

59. **Ms. Montejo** (Office of Legal Affairs) said that the Organization conducted its arbitrations outside of the procedural laws of the place of arbitration, in line with the 1946 Convention on the Privileges and Immunities of the United Nations. Therefore the bracketed text at the end of the last sentence of paragraph 2 might be interpreted in some instances as a waiver of the Organization's privileges and immunities. If that text was eventually adopted, a note would need to be added indicating that it did not signify such a waiver.

60. **The Chairperson** said that, as the Organization was not subject to the arbitration law at the seat of arbitration, it had no right of appeal under that law. There was therefore no need to provide for a waiver of that right.

61. **Ms. Montejo** (Office of Legal Affairs) said that the opposing parties might have different rights.

62. **Mr. Viswanathan** (India) concurred with the representative of Canada that if the words in square brackets were retained, then the entirety of the text should be retained. Under Indian law, once an award was granted by the arbitrators, the right of parties to challenge the award in court on any grounds permitted by the arbitration law could not be waived. Any agreement between the parties waiving recourse to a court was null and void under the Indian Contract Act.

63. **Mr. Montecino Giralt** (El Salvador) expressed his support for the position taken by the representative of Argentina. As set out in document A/CN.9/704/Add.1, his Government's proposal was to include the words "In so far as permitted under the law applicable to the arbitration", in order to ensure that the provision in draft paragraph 2 applied both to countries in which a waiver of the right of appeal was permitted and to those in which it was not.

64. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that he felt uneasy about the provision under discussion. It was misleading to state that "the parties shall carry out all awards without delay", since a motion to set aside or any resistance to enforcement could cause considerable delay. An observation to that effect should be made in the report.

65. Moreover, the report should make it clear that parties had a right to resist enforcement under article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and had a right to move to set aside or annul an award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration. The reference to a waiver of the right of appeal was therefore misleading, since parties had a right of appeal under the applicable law; the report should state that the right in question was limited to the grounds of the Model Law. In the text of the Rules, it would be preferable to retain, at most, the first two sentences of draft paragraph 2.

66. **Mr. Boulet** (Observer for Belgium) said that his Government was in favour of retaining the words in square brackets. Since the Committee was formulating a waiver clause, it must specify what was being waived. That was the purpose of the bracketed words, which also set out the limitations to the waiver.

67. **Mr. Moollan** (Mauritius) said that, in the absence of consensus, it was preferable to let the previous wording of article 34 stand. The words in brackets were based on the false assumption that the Model Law was applicable everywhere. Even where the Model Law had been enacted, derogations were often made from the model text. In the United Kingdom, for example, the provision under discussion would conflict with section 69 of the English Arbitration Act, under which setting aside was itself the remedy.

68. **Mr. Castello** (United States of America), with support from the representative of Mauritius, said that, if the first two sentences of draft paragraph 2 were to stand, then the wording contained in the draft should be retained rather than the wording of the 1976 Arbitration Rules, as an important amendment had been made to one of those sentences.

69. **The Chairperson** said that there was strong support for retaining the first two sentences of draft paragraph 2 and that there was no objection to the drafting changes in the third sentence proposed by the United States. The differences arose with respect to the bracketed phrase at the end of the paragraph. He was concerned that, unlike for article 16, the Committee could not assume that a judge would understand the meaning of the provision, since it dealt with procedural remedies for which the diverse terminology used in different countries might create confusion. He invited the Committee to consider whether there was any justification for specifying what types of recourse were reserved, given the difficulty of doing so. In the alternative, it might be best to highlight, as proposed by China, that only those remedies were excluded which the applicable law allowed to be excluded.

70. **Ms. Cordero Moss** (Norway) proposed the following wording, which in her view was sufficiently clear on what was being waived: "the parties waive their right to any form of appeal ... that may be waived under the applicable law and the waiver of which does not require a specific agreement".

The meeting rose at 1.05 p.m.

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Forty-third session

Summary record of the 904th meeting

Held at Headquarters, New York, on Tuesday, 22 June 2010, at 3 p.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

Contents

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

10-41663 (E)

Please recycle

The meeting was called to order at 3.20 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section IV. The award (*continued*)

Draft article 41. Fees and expenses of arbitrators

1. **The Chairperson** invited the Committee to resume its consideration of draft article 41.

2. **Mr. Bellenger** (France) said that, although his delegation had no problem with the substance of draft article 41, it was too long and repetitious and its style ponderous. For example, the first sentence of draft article 41, paragraph 2, could be shortened by deleting the words "has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority". The manner in which the appointing party was designated was set out clearly in another part of the Arbitration Rules.

3. Draft article 13, paragraph 4, should be deleted because it was, in essence, a repetition of draft article 41, paragraph 4. Alternatively, the Committee could choose to retain draft article 41, paragraph 4, and shorten draft article 13, paragraph 4.

4. **The Chairperson** recalled that in its comments on the revised Arbitration Rules (A/CN.9/704/Add.5), the Comité Français de l'Arbitrage had also proposed simplifying draft article 41, paragraph 4.

5. With regard to draft article 41, paragraph 2, he said the representative of France had proposed that the beginning of the paragraph should be amended to read: "If the appointing authority applies or has stated that it will apply ...". He took it that the Committee wished to approve the proposed wording.

6. *It was so decided.*

7. **The Chairperson** said he understood that the delegation of France wished to propose an amendment to draft article 41, paragraph 4.

8. **Mr. Bellenger** (France) said that, instead of amending draft article 41, paragraph 4, his delegation would prefer to delete the last sentence of draft article 6, paragraph 4, which provided that the parties might request the Secretary-General of the Permanent Court of Arbitration (PCA) to make a decision on the fees and expenses of arbitrators under draft article 41, paragraph 4. That course of action was preferable because draft article 6 set out the general terms for designating and appointing authorities while draft article 41 was specifically concerned with arbitrators' fees and expenses.

9. **Mr. Boulet** (Observer for Belgium) said that his delegation supported the proposal that had been made by the representative of France. All issues related to arbitrators' fees and expenses should be addressed in draft article 41. He therefore proposed that the bracketed words in article 41, paragraph 4, should be deleted and that the paragraph's second sentence should read: "Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated or if the appointing authority refuses or fails to make any decision, to the Secretary-General of the PCA".

10. **Mr. Chung** Chang-ho (Republic of Korea) said that his delegation was reluctant to delete draft article 6, paragraph 4, because it offered the parties two possible courses of action should the appointing authority fail to act. The paragraph's first sentence provided for the designation of a substitute appointing authority, thereby addressing situations that might arise in relation to draft articles 8 to 14 and draft article 41, paragraph 3, while the paragraph's second sentence was concerned solely with situations that might arise in relation to draft article 41, paragraph 4.

11. Removing the second sentence of draft article 6, paragraph 4, would create confusion as to which option could be applied in situations where the appointing authority refused or failed to act in accordance with the Arbitration Rules. It would therefore be preferable to retain draft article 6, paragraph 4, in its present form.

12. **The Chairperson** said that the Working Group had decided to group all provisions concerning the appointing authority under draft article 6. In discussing draft article 41, it had further decided that an additional provision in that regard could be introduced into the second sentence of draft article 41, paragraph 4. Since the circumstances addressed by the additional provision could occur only under draft article 41, paragraph 4, the observer for Belgium had proposed that those circumstances should be regulated in draft article 41.

13. **Mr. Chung** Chang-ho (Republic of Korea) said deleting the second sentence of draft article 6, paragraph 4, might create the impression that the parties could request the PCA to designate a substitute appointing authority. Should the Committee choose to delete the second sentence, it might wish to include a proviso that addressed situations that could arise under draft article 41, paragraph 4.

14. **Mr. Castello** (United States of America) said that he supported the position of the representative of the Republic of Korea. In fact, removing the second sentence of article 6, paragraph 4, would be misleading because it created a general rule whereby the parties could request the designation of a substitute appointing authority if the appointing authority refused to act within any time period specified in the Arbitration Rules. It would be best to leave draft article 6, paragraph 4, intact and introduce cross-references into both paragraphs to guide the reader.

15. **Mr. Petrochilos** (Greece) said that the most logical place for the entire provision was draft article 41, paragraph 4, as had been proposed by the observer for Belgium. The United States proposal would effectively split the provision across draft article 6, paragraph 4, and draft article 41, paragraph 4. The treatment of the same exception in two different articles was not sound legislative technique and would confuse any reader who had not participated in the drafting of the Arbitration Rules. The best approach would be to introduce language into draft article 6, paragraph 4, notifying the reader that draft article 41, paragraph 4, contained an exception.

16. **The Chairperson** said it was his understanding that the choice before the Committee was either to introduce the exception in draft article 41, paragraph 4, and clarify that it was an exception to draft article 6, paragraph 4, or vice versa.

17. **Mr. Petrochilos** (Greece) pointed out that draft article 6, paragraph 4, was intended to address a situation in which the appointing authority failed or refused to act, whereas draft article 41, paragraph 4, was intended to address a situation in which the appointing authority had not been designated or agreed or had failed or refused to act. Since draft article 6, paragraph 4, did not address all of the circumstances in which parties might wish to turn to the Secretary-General of the PCA, it was more logical to group all of the exceptions under draft article 41, paragraph 4.

18. **Mr. Bellenger** (France) said it was his understanding that disputes concerning fees and expenses that arose at such a late stage in the arbitral process could be addressed through only two specific remedies: the designation of a substitute appointing authority or direct referral of the dispute to the Secretary-General of the PCA. That was why his delegation had proposed that the entire issue should be addressed under draft article 41. However, if the Committee agreed with the observations of the representative of the Republic of Korea, then his delegation's proposal was no longer valid.

19. **The Chairperson** said that, in situations where an appointing authority had not been designated or had refused to act, the key question was whether the Committee wished to preserve the right of the parties to request the designation of a substitute appointing authority or whether the parties should be given the sole option of turning to the Secretary-General of the PCA.

20. **Mr. Boulet** (Observer for Belgium) said that, even if the second sentence of draft article 6, paragraph 4, was deleted, it was unwise to completely remove from article 6 all references to draft article 41. The reason was that all steps connected with designating an appointing authority were more logically taken at an early stage in the arbitration process, and were thus dealt with at an early point in the Rules. The representatives of the Republic of Korea and Greece had rightly pointed out the difficulty in readability and comprehension that would arise if article 6, paragraph 4, and article 41, paragraph 4, were not clearly connected. One way to achieve that linkage would be to add to the first sentence of article 6, paragraph 4, the phrase "Subject to the provisions of article 14, paragraph 4", or other words to the same effect.

21. **The Chairperson** said that a consensus appeared to have formed around the proposal of the representative of Belgium to delete both the second sentence of draft article 6 and the reference to article 6 contained in square brackets in draft article 41, paragraph 4. Appropriate drafting changes would be necessary.

22. **Mr. Friedman** (Observer for the International Bar Association) said that the Rules should ideally be simple to follow, but that was not the case with paragraph 4 of draft article 41 in its current form. He suggested that the reference in the first sentence to

article 40, paragraphs 2 (a) and (b), should be deleted. In addition, the third sentence of the paragraph should be amended to begin as follows: "If, and to the extent that, the appointing authority finds that the arbitral tribunal's determination of fees and expenses is inconsistent with the fee proposal, or is otherwise manifestly excessive, the appointing authority or the Secretary-General of the PCA shall, within 45 days of receiving such a referral, make any necessary adjustments ...". In order to take account of the discussion just concluded, it could be specified that, if no appointing authority had been designated or if the appointing authority refused to act, the determination should be made by the Secretary-General of the PCA.

23. **Ms. Smyth** (Australia) said that she supported the suggested changes.

24. **Mr. Castello** (United States of America) said that, while he agreed with the basis for the suggestions of the observer for the International Bar Association, paragraph 4 of draft article 41 was the product of long discussion. The Committee should take the time needed to examine carefully any proposed amendments, which should be presented in writing rather than orally.

25. Since the last meeting of Working Group II in February 2010, his delegation had continued to ponder the usefulness of draft article 41, paragraph 4, not on the basis of opposition to regulating levels of fees and expenses, but because the mechanism proposed was trying to apply a remedy of uncertain effectiveness and risk to a problem of unknown extent. So far, only anecdotal evidence of excessive or unreasonable fees existed. He wondered how often an appointing authority would detect and correct improper levels of fees, whether it might not seek to revise fees for an unrelated reason and whether there was a risk that disgruntled losing parties in an arbitration might challenge the fees charged because such action guaranteed a delay in the enforcement of the arbitral award of a total of up to 60 days, as detailed in draft article 41, paragraph 3.

26. Moreover, an appointing authority requested to review fees and expenses was likely to charge for that service, for which it would also require evidence, including arbitrators' invoices. It should be remembered that, as the review would be taking place at the beginning of the arbitral process, the appointing authority was also likely to demand a deposit representing part of the cost of its review from the party requesting the review. However, such a deposit might in fact help to deter frivolous review requests.

27. **Mr. Snijders** (Observer for the Netherlands) said, as a related consideration, that draft article 41, paragraph 3, appeared not to address the possibility of there being no appointing authority, or of the appointing authority refusing to act. Perhaps language providing for a request to the PCA Secretary-General to designate a substitute appointing authority should be added.

28. **The Chairperson** said he recalled that the omission from draft article 41, paragraph 3, of the possibility of requesting the PCA Secretary-General to designate a substitute appointing authority had been deliberate. Draft article 6 established the general principle that, if a problem arose with the appointing authority, the parties must turn to the PCA. However, it had been decided not to prescribe the launching of such a time-consuming process at the late stage of the arbitration procedure described in draft article 41, paragraph 2. That paragraph therefore provided that the power of designation should be given directly to the PCA Secretary-General. In contrast, paragraph 3 of that same article described an early stage in the arbitration process, just after the constitution of the arbitral tribunal, during which the general principle could still apply.

29. **Mr. Daly** (Observer for the Permanent Court of Arbitration) expressed concern that the amendments to article 41, paragraph 2, proposed by the representatives of Greece and France might cause confusion by implying that there must always be an appointing authority. In fact, many arbitration cases proceeded without such an authority. The involvement of an appointing authority in determining a schedule or method of determining arbitrators' fees, as described in paragraph 2, occurred only if such an authority had been agreed upon or had been designated by the PCA Secretary-General.

30. **The Chairperson** said that the wording of paragraph 2 should be examined from the standpoint of clarity for arbitration users and practitioners. In the current case, the test was whether those individuals could easily infer from that paragraph that if no appointing authority had been agreed upon or designated, the arbitral tribunal would simply have no

schedule or method of determining fees to use as a point of reference.

31. **Mr. Castello** (United States of America) said that confusion might be avoided by amending the beginning of paragraph 2 to read: "If there is an appointing authority, and it applies or has stated that it will apply a schedule ...".

32. **Mr. Möller** (Observer for Finland) said that he shared the concerns of the representative of the United States regarding the mechanism for regulating arbitrators' fees and expenses.

33. **Mr. Petrochilos** (Greece) said that he agreed in principle with the view of the United States representative regarding a deposit against the cost of a review. As draft article 4 currently made no such provision, he would like to see the specific language proposed. On the general issue addressed in paragraph 4, while the scope of the problem was unclear, nevertheless something had to be done about the kind of very grave instances of rogue decisions by arbitral tribunals that were known to have taken place — even though they had been described as "anecdotal" — and that could only lead the parties to lose confidence in the arbitration process. There were two options for redress in such cases: to apply to the courts — and the difficulty of finding both the appropriate jurisdiction and the legal basis for doing so was well known; or to resolve the matter in an ad hoc manner in the pro-arbitration fashion set out in paragraph 4.

34. Regarding the risk of abuse, paragraph 6 had been inserted to make it clear that the challenge did not affect any determination by the tribunal other than the costs at issue. The cost deterrent referred to by the United States would also help prevent abuse. Paragraph 4 should be seen as part of a mechanism that started in paragraphs 2 and 3, which allowed the parties to know in advance what the tribunal was proposing with regard to fees and expenses. Paragraph 4 served as a last check-and-balance. After four years of discussion, the Working Group had decided that unless the Commission was ready either to give the arbitrators free rein or to subject them to problematic court proceedings, paragraph 4 was the best compromise.

35. **The Chairperson** asked the United States to draft wording for his proposal regarding a deposit, for subsequent consideration.

36. He drew attention to a written proposal by the Netherlands (in document A/CN.9/704/Add.2, p. 5) that at the end of paragraph 4, the words "pursuant to article 38" should be deleted and replaced by a new final sentence, "Article 38, paragraph 3, shall apply."; the reasoning was that not all provisions of article 38 applied, and that those that did applied only by analogy.

37. **Mr. Castello** (United States of America) recalled that after much discussion, the Working Group had been unsure of the effect of the application of article 38 on an action that was going to be taken by the arbitral tribunal. Perhaps paragraph 4 could be amended to read, "The procedure of article 38, paragraph 3, shall apply.".

38. *It was so decided.*

39. *Draft article 41, as amended, was adopted, subject to agreed redrafting.*

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

Section I. Introductory rules (*continued*)

Draft article 6. Designating and appointing authorities (*continued*)

40. **Mr. Castello** (United States of America) recalled that he had been asked to draft wording for a point raised by the Observer for the Association of the Bar of the City of New York, which was not covered in draft article 6, paragraph 4, namely, the failure of an appointing authority to act in response to a challenge. In the first sentence of paragraph 4, he proposed deleting the word "or" before the words "fails to act", and inserting the following clause after the phrase "by these Rules,": "or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so,".

41. Nowhere in the Rules or draft articles was there a time limit for an appointing authority to resolve a challenge, and he had not proposed that one should be established in paragraph 4 — even though that had been done earlier in the paragraph in the case of the appointment of arbitrators — because it was hard to predict how long the process would take. The solution had seemed to be to set a "reasonable" time. Although he had originally intended to formulate a general clause encompassing the three possibilities described

in paragraph 4, it had been too hard to craft one and he had settled on an enumeration. The paragraph covered an activity for which there was no time limit elsewhere in the Rules but which was made subject to one now — the appointment of an arbitrator, together with other activities by the appointing authority which were subject to time limits elsewhere in the Rules and the question of the challenge, which for good reason was nowhere subject to time limits.

42. **Mr. Moollan** (Mauritius) said that there was another possible approach. The various time periods now specified in article 6, paragraph 4, could be specified instead in the articles where they applied: for example, in the case of the appointment of arbitrators, articles 8 and 10, and in the case of the challenge, article 13, paragraph 4. That would have the advantage of alerting the appointing authority to the deadline in the relevant Rule itself. The language of article 6, paragraph 4, could then be simplified to read: "If the appointing authority refuses to act or fails to act within a period provided by the Rules, etc.".

43. **The Chairperson** asked Mauritius to devise wording for the articles affected by his proposal, for subsequent consideration. The other point left pending in draft article 6 was the wording for the exception that it had been decided would replace the second sentence of paragraph 4.

Section III. Arbitral proceedings (*continued*)

Draft article 17. General provisions (*continued*)

44. **Mr. Moure** (Observer for the International Bar Association) said that, in the first sentence of draft article 17, paragraph 1, the decision to replace the words "full opportunity" by the words "an opportunity" gave perhaps too much latitude to the arbitral tribunal in allowing a party to present its case. He suggested instead the words "a reasonable opportunity".

45. **Mr. Möller** (Observer for Finland) said that another possibility was an "adequate" opportunity.

46. **Mr. Chung** Chang-ho (Republic of Korea) said that if qualifying the word "opportunity" in draft article 17 entailed qualifying its every appearance throughout the Rules, he would favour keeping the text as it stood.

47. **Mr. Boulet** (Observer for Belgium) suggested that, in the French text, rather than "une possibilité" (an opportunity), it would be preferable to say "la possibilité" (the opportunity).

48. **Mr. Moollan** (Mauritius) cited the 1996 English Arbitration Act, which allowed the parties "a reasonable opportunity". He said that the addition of the qualifier "reasonable" in draft article 17, paragraph 1, would not need to be repeated for each occurrence of the word "opportunity" throughout the draft text.

49. **The Chairperson** said that the replacement of "an opportunity" by "the opportunity" did not appear to resolve the matter.

50. **Ms. Matias** (Israel) expressed agreement with the point made by the delegation of the Republic of Korea. Each and every opportunity provided for by the draft Rules should be reasonable.

51. **Mr. Snijders** (Observer for the Netherlands) said that article 15 of the Rules of Arbitration of the International Chamber of Commerce allowed each party a reasonable opportunity to present its case. It would not be strange to specify that the opportunity should be reasonable in the present case since that was a fundamental principle for equality of the parties.

52. **Mr. Bellenger** (France) said that, in the French text, the qualification of "une possibilité" (an opportunity) by the word "raisonnable" (reasonable) amounted to a reduction of the opportunity thus provided for. He recalled that the 1976 Rules had given the parties "toute possibilité" (a full opportunity) of presenting their case; that opportunity must be guaranteed.

53. **The Chairperson** noted that none of the other opportunities provided for in the draft text was for the purpose of presenting a party's case. The addition of the word "reasonable" could therefore be justified in draft article 17 without its having to be repeated elsewhere.

54. **Mr. Schöll** (Observer for Switzerland) said that the main concern should be to ensure that the parties had an equal opportunity to exercise their right to be heard.

55. **Mr. Anaya** (El Salvador) expressed support for the addition of the word "reasonable" in paragraph 1 on the ground that it was a general provision.

56. **Mr. Chung** Chang-ho (Republic of Korea) concurred with the delegation of France that the

opportunity for a party to present its case should be fully protected.

57. **Mr. Moollan** (Mauritius) suggested the reinstatement of the 1976 wording "a full opportunity" or, alternatively, the introduction of the qualification "adequate" before the word "opportunity".

58. **The Chairperson** said the intention of the Working Group in removing the word "full" had been to avoid excessive pleadings. Responding to the point made by the delegation of France, he acknowledged that a reasonable opportunity was one that was not unlimited.

59. **Ms. Matias** (Israel) said that, if the concern was indeed to limit the opportunity offered, the insertion of the word "reasonable" appeared justified.

60. **Mr. Castello** (United States of America) said that, by changing "full" to "reasonable", the Working Group would have reduced the opportunity for challenge excessively. It was indeed preferable not to qualify the opportunity so as to ensure adequate but not unlimited opportunity for challenge.

61. **The Chairperson** noted that, in the Arbitration Rules of the International Chamber of Commerce, where the English text allowed each party "a reasonable opportunity to present its case", the French version provided that each party should have "la possibilité d'être suffisament entendu" (the opportunity of a sufficient hearing).

62. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that the Committee should be guided by the practice of others. A persuasive argument in favour of the formula "a reasonable opportunity" was that other bodies had found it to be the most workable.

63. **Mr. Bellenger** (France) proposed the word "adéquat" rather than "raisonnable" in the French version. The draft text set out a principle, not a rule of procedure; its object was to give full latitude to the arbitral tribunal to decide on procedure within limits imposed by equality of the parties and respect for their rights.

64. **The Chairperson** said that there appeared to be a consensus in support of the insertion of "reasonable" before the word "opportunity" in paragraph 1 of draft article 17.

65. Turning to paragraph 5 of the draft article, he said that, in the event of a request being made to join a third party in the arbitration, that party would be protected through the refusal of such a joinder where it would be considered prejudicial to the interests of any party.

66. **Ms. Hu** Shengtao (China) said that prejudice to any of the parties to an arbitration agreement should not be a ground for not allowing the joinder of a third person, as the arbitral tribunal had no right to prohibit such joinder: as a party to the arbitration agreement, a third party could be a claimant, just as that party could not be refused the right to act as a respondent. Moreover, in accordance with draft article 10, a third party joined should be able to appoint or reappoint an arbitrator in the same way as other parties to the arbitration agreement.

The meeting rose at 6.10 p.m.